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## **CAN LAW FIRM PARTNERS SUE THE FIRM FOR EMPLOYMENT DISCRIMINATION?**

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### **I. OVERVIEW**

Traditionally, law firms were organized as “true partnerships” in which each partner had a substantial voice in firm affairs and could be subjected to unlimited liability for the debts of the firm. As high profile cases have highlighted the risks of such a structure, however, many firms have abandoned the classic form and adopted “hybrid” business models such as professional corporations, limited liability companies, and limited liability partnerships.

In these hybrid business models, firms often choose to consolidate management and control of the firms’ affairs in small executive or management committees. Firms also, with increased frequency, have created tiered partnerships and “quasi-partner” positions for senior attorneys such as “of counsel,” “special counsel,” “junior partner,” or “non-equity partner.” By creating these less-than-full-partnership-positions, firms can ensure that the management of the firm remains in the hands of a few partners in the “inner circle” while retaining experienced, senior attorneys who can generate substantial revenue for the firm.

Such consolidation of control, comes at a cost, however. By configuring themselves as “de facto corporations,” placing substantial control in the hands of a few, and subjecting the remaining partners to the decisions of those in power, firms may expose themselves to employment discrimination suits brought by their own partners.

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The federal employment discrimination laws – the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”) – protect “employees” of companies, not employers or owners. Law firm associates are undoubtedly “employees” and can therefore invoke the employment discrimination laws. *Hishon v. King and Spaulding*, 467 U.S. 69 (1984). It is a more complicated question, however, whether those laws protect law firm partners.

Under hornbook partnership law, law firm partners are co-owners of the firm, not employees, and therefore would seem to be unprotected from employment discrimination. In *Hishon*, Justice Powell explained in his concurring opinion that Title VII does not protect partners in law firms because a partner’s relationship to the firm “differs markedly from that between employer and employee.” A law partnership involves “the common conduct of a shared enterprise.” The relationship among law partners contemplates that “decisions will be made by common agreement or consent among the partners.” *Hishon*, 467 U.S. at 79-80.

Many of today’s law firms, however, bear little resemblance to the firm that Justice Powell describes. As a partner’s relationship with the firm strays further from Justice Powell’s notion of a “shared enterprise,” and closer to a master / servant relationship, courts are more likely to deem a partner an “employee” for purposes of employment discrimination laws.

Indeed, the caselaw is clear that partners are not always employers. *See e.g.*, *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696, 702 (7<sup>th</sup> Cir. 2002). A law firm cannot avoid liability under employment discrimination laws simply by labeling attorneys as partners. *Hishon*, 467 U.S. at 80, n.2 (Powell, J. concurring); *Sidley*, 315 F.3d at 702. For years courts have struggled to determine when partners are employees and therefore protected by the employment discrimination statutes. The recent popularity of the various hybrid business models has only added to the confusion.

The Supreme Court provided some much needed guidance in its recent decision in *Clackamas Gastroenterology Assoc, P.C. v. Wells*, 123 S.Ct. 1673 (2003). The Court endorsed a six factor test and held that the “principal guidepost” in the determination must be the amount of control that the firm has over the partner in question and the degree to which the partner can influence the management of the firm. *Id.* at 1679. Importantly, the Court’s approach makes no distinction among the various business models.

This article will first discuss reasons that law firms, especially large firms, are susceptible to discrimination suits by their partners. Next, it will explain two threshold requirements for law firm partners to sue their firms for employment discrimination. Both of these requirements turn on whether certain partners are deemed employees. Third, the article will discuss the Supreme Court’s *Clackamas* decision and lower court decisions that preceded *Clackamas* but used similar analyses. Finally, it will note that,

under some federal and state laws, law firms are vulnerable even if their partners are not deemed employees.

## II. LAW FIRMS ARE PARTICULARLY VULNERABLE TO EMPLOYMENT DISCRIMINATION SUITS

Many law firms are highly segregated by gender and race. JENNIFER L. PIERCE, *GENDER TRIALS 1* (University of California Press 1995). For example, in the New York City offices of the 20 most prestigious New York law firms (according to *The Vault Guide to the Top 100 Law Firms*, 6<sup>th</sup> Edition, 2003), only 14% of all partners are women while women constitute 41.59% of all associates. The numbers for minorities are even worse: 4.59% of partners and 20.80% of associates in these offices are minorities. Only 0.95% of partners and 4.86% of associates are African-Americans. (These statistics were aggregated by the authors of this article using data from the National Association for Law Placement Law Firm Questionnaires, 2003-2004 academic year.) It is likely that the disparities at many smaller, regional firms are even more pronounced. *See Women and Attorneys of Color 2002 Summary Chart*, National Association for Law Placement, 2002, available at <http://www.nalp.org/nalpresearch/mw02sum.htm>; and U.S. Equal Employment Opportunity Commission Press Release, October 22, 2003, available at <http://www.eeoc.gov/press/10-22-03.html>.

Moreover, these statistics do not distinguish between tiers or classes of partners (e.g., equity / non-equity, voting / non-voting, or senior / junior). The presence of tiers or classes of partners likely perpetuates the disparities and may even amplify them. Anecdotal evidence indicates that women and minorities constitute a miniscule percentage of the highest-tier partners at large firms.

Although statistical disparities like those cited above do not, without more, violate federal anti-discrimination laws, such disparities expose firms to attack. First, statistical disparities can be used to prove discriminatory intent. *EEOC v. O&G Spring and Wire Forms Specialty Company*, 38 F.3d 872, 877 (7<sup>th</sup> Cir. 1994). Statistics can also form the foundation for “glass ceiling” suits and suits alleging that a firm has engaged in a “pattern or practice of discrimination,” *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977); *Hazelwood School Dist. V. United States*, 433 U.S. 299, 308 (1977); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001) (“Statistics alone can make out a prima facie case of discrimination . . .”). Further, disparate impact suits, alleging that certain employment practices or policies have a significantly greater impact on women or minorities than on others, are most often proved through statistical evidence. *Robinson*, 267 F.3d at 160.

Moreover, minority and female employees who are notably under-represented in the upper ranks of a firm are more likely to believe that their gender or race is a factor when the firm takes adverse employment actions against them. Reputable social science research indicates that they may be right; in white-male-dominated, highly segregated environments, gender and race stereotypes can influence subjective employment

decisions. *See, e.g., Butler v. Home Depot, Inc.*, 1997 WL 605754 at \*7-11 (N.D. Cal. Aug. 29, 1997) (denying summary judgment based, in part, on such social-science testimony). It is at least arguable, if not likely, that many large law firms have such environments.

Employment decisions in law-firms are particularly susceptible to the influence of stereotypes because they are often, by nature, largely subjective. Hiring decisions, promotion decisions, case-staffing decisions, and compensation decisions are all often based, at least in part, on non-quantifiable criteria. *See* CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 200-03 (University of Illinois Press 1993). These types of decisions are particularly vulnerable to the influence of unlawful gender or race stereotypes. *Butler*, 1997 WL 605754, at \*7; *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”).

Moreover, stereotypes, often unconscious ones, often result in subtle differences between the opportunities afforded to women and minority lawyers and those given to their white male counterparts. These denied opportunities often help explain why women and minorities are often passed over for promotions and either “die on the vine,” leave firms for in-house counsel positions and other opportunities, or simply leave the legal profession. Many leave even before they are formally passed over because they can see the writing on the wall. *See* CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 214-15, 265-68 (1993).

Mentoring is a perfect example of a situation in which stereotypes, often unconscious, affect the opportunities of women and minority lawyers. Because mentorships, especially informal ones, often commence soon after a lawyer joins a firm, they are seldom assigned or formed based on merit. Instead, partners often choose associates to groom who are like them – “one of the boys,” for example. Based on the statistical evidence that the overwhelming majority of law firm partners are white males, white males are more likely to dominate the ranks of the chosen few. They are then more thoroughly trained and given more desirable assignments than their counterparts, helping them develop both their legal skills and their professional networks. As a result, eight years later, the non-favored associates have often fallen short of the firm’s expectations for partners in billable hours, practical experience, and client development, while the chosen few (typically white males), move on to partnership and perpetuate the cycle. *See generally*, JENNIFER L. PIERCE, *GENDER TRIALS* 103-13 (1995).

Although the mentoring problem most often applies to associates, subjective decision-making influenced by gender and race stereotypes often affects partners as well, especially in tiered partnerships. Even female or minority lawyers who overcome any initial handicaps and make partner may hit a glass ceiling at the next threshold – between junior partner and senior partner or between non-equity partner and equity partner. Partners also may be denied bonuses or other discretionary compensation, removed from desirable cases, denied committee memberships, denied mentors, excluded from

networking and client development opportunities, demoted, or terminated. *See id.* at 105-06.

Another problem that female and minority lower tier partners may face is case assignment based on real or perceived client preference. A senior partner may tend to assign certain matters to junior partners with whom the senior partner believes a client will feel comfortable. This belief is sometimes based on the client's stated preference and sometimes on the senior partner's assumptions or beliefs. *See id.* at 109-11. The practice is innocuous enough unless, either subconsciously or not, the senior partner takes the lawyer's gender or race into account in making the assignment.

If a client does indicate that he would prefer not to be represented by a woman or a minority, the firm would probably violate the law if it bases any employment decision on such a request. Title VII allows firms to take into account employees' religion, gender, or national origin only if such a classification "is a bona fide occupational qualification ("BFOQ") reasonably necessary to the normal operation" of a particular business. 42 U.S.C. § 2000e-2 (e). Race, however, can never be a BFOQ. *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981).

Customer or client preference is almost never a sufficient basis for a BFOQ, even if the employer will likely lose the client because of its refusal to cater to the preference. "Customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers." *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting defense that gender is a BFOQ because airlines' customers prefer female flight attendants); compare *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (stereotypical impressions of male and female roles do not qualify gender as a BFOQ) with *Kern v. Dynallectron Corp.*, 746 F.2d 810 (5th Cir. 1984) (approving of the Muslim religion as a BFOQ for pilots who fly into Mecca because of the local practice of beheading non-Muslim pilots).

Any adverse employment action, including the creation of a hostile working environment, can be the basis for a partner's employment discrimination claim against a law firm. The question is – does the aggrieved partner have a cause of action?

### **III. DO THE EMPLOYMENT DISCRIMINATION STATUTES APPLY?**

The determination of whether the plaintiff is an "employee" is a threshold issue in any employment discrimination case. When the plaintiff is a law firm partner, the court must make two preliminary determinations:

The first question is whether the partner may invoke the employment discrimination laws at all. The partner must be deemed an "employee" to be protected; the statutes do not protect partner-employers. *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696, 698 (7th Cir. 2002); *Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996). For the purposes of the employment discrimination laws, an individual cannot

simultaneously be an employee and an employer. *Serpion v. Martinez*, 119 F.3d 982, 985 (1<sup>st</sup> Cir. 1997).

Second, the federal employment discrimination statutes do not apply to small employers – the firm must have enough employees to be covered at all. Title VII and the ADA exempt employers with fewer than 15 employees. 42 U.S.C. § 2000e(b) (Title VII); 42 U.S.C. § 12111(5) (ADA). The threshold under the ADEA is 20 employees. 29 U.S.C. § 630(b). Especially in small firms with few associates and a small support staff, the firm might be too small to be covered if some “partners” are not deemed “employees.”

Additionally, the number of firm employees determines the firm’s potential liability for compensatory and punitive damages. The thresholds for compensatory and punitive damages are tiered. For example, under Title VII, a firm with between 15 and 100 employees can be liable for only \$50,000 in punitive and compensatory damages, while such liability for a firm with more than 500 employees is capped at \$300,000. 42 U.S.C. § 1981a (b) (3). In some cases, partners who are deemed “employees” will push the firm past the next threshold, causing the firm to bear the risk of a larger judgment.

#### **IV. *EEOC v. Sidley Austin Brown & Wood*: LAW FIRMS ARE ON NOTICE**

In October 2002, the Seventh Circuit decided *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7<sup>th</sup> Cir 2002), which should serve as a wake-up call for law firms, especially large firms. In *Sidley*, the firm demoted 32 of its equity partners to “counsel” or “senior counsel,” prompting the Equal Employment Opportunity Commission (“EEOC” or “Commission”) to initiate an investigation, *sua sponte*, to determine whether the demotions violated the ADEA. As part of its investigation, the EEOC issued a subpoena seeking documents that would allow it to determine whether the demoted partners were employees and could therefore invoke the ADEA.

*Sidley* refused to fully comply with the subpoena and the EEOC went to federal court to enforce it. *Sidley* argued that it had already produced enough documents to show that the 32 were “real” partners and that the EEOC had no basis to continue its investigation. *Id.* at 698-99. The district court rejected *Sidley*’s argument and granted the EEOC’s request to enforce the subpoena. The Seventh Circuit affirmed in relevant part. It held that the demoted partners may be “employees” under the ADEA because, from the documents that were produced, they appeared to lack any meaningful control over the firm’s affairs. *Id.* at 707.

Firms should take note of *Sidley* for at least two reasons. First, the EEOC’s decision to initiate its investigation without receiving a complaint from any of the demoted partners, *EEOC v. Sidley & Austin*, 2002 WL 206485, at \*1, n.2 (N.D.Ill. Feb. 11, 2002), signals the Commission’s recently heightened interest in promoting diversity in law firms. (In fact, the EEOC recently published an extensive study of diversity in law firms. *See Diversity in Law Firms*, U.S. Equal Opportunity Commission, October 22, 2003, available at <http://www.eeoc.gov/stats/reports/diversitylaw/index.html>.)

Moreover, *Sidley* demonstrates that courts are willing to subject law firms to liability for discrimination against partners who are deemed to be “employees.”

### A. Partner-Employer or Employee?

The statutes themselves are of no help in determining a partner’s status – they do not define “employee” in any functional manner. Under Title VII, “employee” is defined as, “an individual employed by an employer.” 42 U.S.C. § 2000e (f). The corresponding provisions in the ADA, 42 U.S.C. § 12111 (4), and the ADEA, 29 U.S.C. § 603 (f) also contain “completely circular” definitions of “employee.” *Clackamas*, 123 S.Ct. at 1677.

Prior to *Clackamas*, courts struggled to articulate a workable approach. With respect to traditional partnerships as well as hybrid business models, most courts agreed that the label, “partner” was not dispositive. Almost all courts applied some variation of an “economic realities test,” examining the nature of the relationship between the partner and the firm. See *Wheeler v. Main Hurdman*, 825 F.2d 257 (10<sup>th</sup> Cir. 1987) (employing an “economic realities” test to a true partnership); *Schmidt v. Ottawa Medical Center, P.C.*, 322 F.3d 461 (7<sup>th</sup> Cir. 2003) (applying an “economic realities test” to a professional corporation).

On the other hand, some courts adopted rules that emphasized form over substance. The Second Circuit and the Ninth Circuit adopted the per-se rule that the use of any quasi-corporate form precludes a firm from arguing that its lawyers were partners and not employees. *Wells v. Clackamas Gastroenterology Assoc., P.C.*, 271 F.3d 793, 905 (9<sup>th</sup> Cir. 2001); *Hyland v. New Haven Radiology Assoc., P.C.*, 794 F.2d 793, 798 (2d Cir. 1986). The Ninth Circuit saw “no reason to permit a professional corporation to secure the ‘best of both worlds’ by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful discrimination.” 271 F.3d at 905. See also *Burke v. Friedman*, 556 F.2d 867, 869 (7<sup>th</sup> Cir. 1977) (“We do not see how partners can be regarded as employees rather than employers who own and manage the operation of the business”).

The Supreme Court granted certiorari in *Clackamas* to resolve this conflict among the Circuits. *Clackamas*, 123 S.Ct. at 1677. In *Clackamas*, the Court set forth a framework for analyzing the employment status of partners for the purposes of the federal employment discrimination laws. Even more helpful is that the Court’s framework can be applied to any business model, establishing, for the first time, a uniform method of analysis.

The issue before the *Clackamas* Court was whether four physicians, who were shareholders and directors of defendant, a professional corporation, should be counted as “employees.” If the four physicians were not “employees,” defendant’s employment roll would not reach the ADA’s 15 employee threshold and the ADA would not apply to defendant. The court below had held that the physicians were automatically “employees”

simply because the defendant elected to exist in a corporate form. *Clackamas*, 123 S.Ct. at 1676-77.

The Supreme Court reversed, rejecting the 9<sup>th</sup> Circuit's "form over substance" approach. It held that an organization's business model does not determine whether its members are "employees." Instead, the Court held, courts must examine "all the incidents" of the relationship and look to "the common law's definition of master-servant relationship." *Id.* at 1678-81. The "common-law element of control," the Court held, must be the "principal guidepost" in this analysis. *Id.* at 1679.

The Court adopted the approach advocated by the EEOC in its Compliance Manual, which focuses on control. The EEOC frames the question as, "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." It provides that, "if the individual is subject to the organization's control, s/he is an employee." *Id.* at 1680 (citing 2 Equal Employment Opportunity Commission, Compliance Manual § 605:0008-605:0009, available at <http://www.eeoc.gov/docs/threshold.html>).

To focus the inquiry, the Court also adopted the EEOC's six factor test. The following "non-exhaustive" factors are "relevant to the inquiry":

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether and, if so, to what extent the organization supervised the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
6. Whether the individual shares in the profits, losses, and liabilities of the organization."

*Clackamas*, 123 S.Ct. at 1680 (citing EEOC Compliance Manual § 605:0009).

Applying this test to the facts before it, the Court noted that some of the district court's findings, including that the partners control the operation of the clinic, that they share in the profits, and that they are personally liable for malpractice claims, weighed in favor of the conclusion that the director-shareholder physicians were not employees. Nonetheless, the Court remanded for further factual determinations.

Since *Clackamas* was decided in April 2003, no reported decisions have thoroughly discussed it. Before *Clackamas*, however, some courts employed methods that were very similar to the *Clackamas* test. Not every court included each of the EEOC's six factors in its analysis but, consistent with the approach that *Clackamas* eventually adopted, most pre-*Clackamas* decisions focused on control.

## **B. Size Matters**

Because of the Supreme Court's emphasis on control, as general rule, the larger the law firm, the more likely that some of its partners/shareholders will be considered employees under the anti-discrimination statutes. In large firms, whether true partnerships or hybrid business models, management is often centralized in a small executive committee or management committee. The ability of most partners, especially junior partners and other types of lower-tier partners, to exert any influence over firm affairs is negligible. As a result, many lawyers who are partners in name have little or no control over firm matters, including their own terms and conditions of employment.

On the other hand, courts are more likely to hold that partners in small law firms are not employees. In small firms, individual partners are more likely to have the ability to influence the firm's management. Even in small firms in which partners do not have an equal vote, or their opinions are not adopted, courts have held that the partner is not an employee as long as she has a meaningful opportunity to express her views and cast her vote.

### **1. Large Firms**

In *Simpson v. Ernst & Young*, 100 F.3d 436 (6<sup>th</sup> Cir. 1996), the court applied a test with factors similar to those endorsed by *Clackamas* and held that the plaintiff was an employee, not a partner, of the large national accounting firm. The court carefully examined the plaintiff's ability to influence the firm, noting that the plaintiff could not participate in personnel decisions, had no voice in compensation decisions, and had no vote in firm governance matters. *Id.* at 441. Instead, despite his "partner" title, the plaintiff was "relegated to the virtually absolute, unilateral control of the Management Committee." *Id.*

Likewise, in *Sidley*, as discussed earlier, the Seventh Circuit stressed the importance of the degree of a partner's control over the firm in determining whether the partner is an employee. It held that the demoted partners may be "employees" under the ADEA because all of the power over the 500-partner firm's affairs resided in a small unelected executive committee. Moreover, the partners who were not members of the executive committee were at the committee's mercy with respect to the terms of their employment, including hiring, firing, compensation, promotion, and demotion. *Sidley*, 315 F.3d at 702-4. Although the demoted partners shared in the profits of the firm, were potentially liable for the firm's debts, and had some administrative functions, the "economic realities" of the demoted partners' relationship to the firm left enough doubt

about whether the demoted partners were covered by the ADEA to entitle the EEOC to enforcement of its subpoena. *Id.* at 707.

## 2. Small Firms

The result is often different with respect to smaller firms where each partner has a greater opportunity to influence firm policy. Before *Clackamas*, the prevailing test was one of control but not necessarily equal control. Several courts held that a partner's participation rights need not be equal to render her a non-employee for the purposes of the employment discrimination laws. Because *Clackamas* does not speak to the amount of control necessary to render a partner a non-employee, these cases are still good law.

For example, in *Devine v. Stone Leyton & Gershman*, 100 F.3d 78, 81 (8<sup>th</sup> Cir. 1996), the court held that shareholders of a small law firm organized as a professional corporation were not "employees" under the Title VII because the shareholders "participated in all management decisions and set firm policy," as well as contributing to firm capital and bearing responsibility for firm debts. *Id.* at 82. The court held that participation rights need not be equal. The test is whether the partner has "a meaningful voice in decision-making." *Id.* at 81.

Likewise, in *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398 (11<sup>th</sup> Cir. 1991), the Eleventh Circuit held that plaintiff, one of five member/shareholders in a small accounting firm, was not an employee under the ADEA despite the "domination by [one] autocratic partner." Plaintiff's "participation in the firm's management, control, and ownership," including his right to vote on admission of new shareholders, changes in compensation, amendment of the firm's agreement, and dissolution of the firm, carried the day. *Id.* at 1401. *See also Serpion v. Martinez*, 119 F.3d 982, 992 (1<sup>st</sup> Cir. 1997) (holding that "the fact that others in the firm may wield more power" than plaintiff does not automatically render plaintiff an employee).

Moreover, if a partner has the opportunity to share in the management and control of a small firm, a court is not likely to deem the partner an "employee," even if the partner's particular views regarding firm affairs are consistently rejected. In *Schmidt v. Ottawa Medical Center, P.C.*, 322 F.3d 461 (7<sup>th</sup> Cir. 2003), the court held that the plaintiff, one of eight physician/shareholders in a professional corporation, was not an employee under the ADEA even though his views on the proper method of shareholder compensation never prevailed. The court noted that the plaintiff's vote was equal to that of the other seven shareholders, he was allowed to vote on all matters put to a vote including the hiring of non-shareholder physicians and shareholder compensation, and he was a member of the board of directors. The court held that "the mere fact that his preferences on shareholder-compensation proposals have not secured the majority opinion of his fellow shareholders does not alter the fact that with each vote he has exercised this right to control." *Id.* at 467.

### C. Ownership

Before *Clackamas*, some courts placed great emphasis on factors related to a partner's ownership interest in the firm, including whether the partner contributed capital to the firm, whether the partner shared in the profits of the firm, and whether the partner was personally liable for the debts of the firm. The cases that focus almost exclusively on ownership probably do not survive *Clackamas* because of the Supreme Court's emphasis on control. Only one of the six factors in the *Clackamas* test addresses ownership. *Clackamas*, 123 S.Ct. at 1680.

In *Wheeler v. Main Hurdman*, for example, the Tenth Circuit's approach is contrary to that in *Clackamas*. While purporting to examine the "total bundle of partnership characteristics," the *Wheeler* court focused almost exclusively on the partner's financial relationship with the 502-partner accounting firm. The court emphasized factors such as profit sharing, contributions to capital, part ownership of partnership assets, and assumption of the risk of loss and liabilities. *Wheeler*, 825 F.2d at 274. The court minimized the importance of control and explicitly rejected the theory that "any individual who is organizationally or economically dominated is an employee." *Id.* at 273.

Likewise, the First Circuit's approach in *Serpion* was probably too heavily weighted towards ownership. There, the plaintiff held an equity interest in the firm, her compensation was based in substantial part on the firm's profits, and she was potentially liable for the firm's losses. 119 F.3d at 991. The court relied on these facts heavily in holding that the plaintiff was not an employee. The court's statement that, "[a] person with the requisite attributes of proprietary status is . . . not an employee, regardless of the fact that others in the firm may wield more power," has likely been abrogated by *Clackamas* and its emphasis on control.

On the other hand, as explained above, in *Sidley*, the Seventh Circuit's emphasis on control was more in tune with the Supreme Court's *Clackamas* holding a year later. With respect to ownership, the *Sidley* court reasoned that ownership should not be emphasized in making the employee/employer determination because an ownership interest in a business entity does not necessarily come with any measure of control over the company – corporate employees often own stock in their companies without holding any power over management whatsoever. *Sidley*, 315 F.3d at 703. The court similarly deemphasized the partners' personal liability for the firm's debts. While noting that unlimited liability was the "most partneresque feature of the 32 partners' relation to the firm", the partners are certainly "not empowered by virtue of bearing large potential liabilities." *Id.* at 704.

## V. CONCLUSION

It will be interesting to observe how courts apply the *Clackamas* test to law firms, especially as many firms continue to evolve from egalitarian partnerships into huge centrally governed entities. The more that firms give their partners a meaningful right to participate in management of the firms' affairs, the less the risk of liability to their partners for employment discrimination.

Ceding such control will not completely insulate firms from discrimination suits, however. Some statutes do not require that a discrimination victim be an employee in order to have a remedy. For example, the Civil Rights Act of 1866, 42 U.S.C. § 1981(a) ("Section 1981") prohibits racially motivated interference with a person's right to make and enforce contracts. Section 1981 is applied similarly to Title VII except that Section 1981 does not require an employment relationship and therefore protects even true partners who would be excluded from Title VII coverage by the *Clackamas* test. Additionally, some state and local employment discrimination laws are not limited to protecting employees. *See, e.g.*, NYC Admin. Code § 8-107 (a) (protecting any "person"); *Jowers v. DME Interactive Holdings, Inc.*, 2003 WL 230739 (S.D.N.Y. Feb. 4, 2003) (NYC Administrative Code applies to "natural persons" who "carry out work in furtherance of an employer's business enterprise").

Of course, the best way for firms to avoid liability is not to discriminate. To this end, firms should (1) take note of the low representation of women and minorities in their partnership ranks; (2) endeavor to provide mentoring, training, and networking opportunities to all associates and partners without respect to gender, race, and other protected categories; (3) to the extent possible, set forth objective criteria for promotion and other benefits to limit the potential for stereotypes to influence decision making; and (4) provide training for partners on the subtle ways that stereotypes and other discrimination can affect lawyers' careers.